Evershed M.R. in his judgment accepted the reasoning of Kennedy C.J. and said that he thought that reasoning should be applied to the case before him.

I have set out at length these authorities as in my opinion the reasoning of Kennedy C.J. in the Irish case which was accepted by Evershed M.R. in the English Court of Appeal case is equally applicable to the case before me. In my opinion the onus in this case lies in the first instance on the appellant (tenant) but in the circumstances he has discharged that onus and established a *prima facie* case and that no attempt had been made by the respondent (landlord) to discharge that *prima facie* case.

In the circumstance of this case therefore, I am of the opinion that the Court must draw the inference that $8.40 was the standard rent of the room in question and that accordingly the respondent can only recover rent at the rate of $8.40 per month in respect of the period claimed by him.

I allow this appeal and the judgment of the Court below must be varied to bring it into accord with the above finding. The respondent is to pay the appellant's costs of this appeal.

Appeal allowed.

Solicitors: *Braddell Bros., K. K. Bezboruah.*

MOHAMED BIN ALLAPITCHAY & ORS. v. REG.

[C. C. A. (Whyatt C.J., Knight and Tan Ah Tah JJ.) December 13, 1957]

[Singapore — Criminal Appeal No. 25 of 1957]

Criminal Law and Procedure — Police report — Admissibility of — Dying declaration — Discretion of Appellate Court to allow — Evidence Ordinance (Cap.4), s.32.

This was an appeal against the conviction of the accused for the murder of one Abdul Rahim. The facts of the case are briefly as follows: The murdered man was a stall-holder at the Telok Ayer Market and it was his habit to sleep at night at his stall which was situated a few yards away from the road which runs alongside the market at this point. Several other neighbouring stall-holders and their assistants also used to sleep at their stalls, in particular, a man named Yusoff and a man named Krishnan, both of whom gave important evidence for the prosecution at the trial. On the night of the murder, the deceased went to sleep at his stall sometime before midnight; several other stall-holders, among them Yusoff and Krishnan, did likewise. At 3.45 a.m. Yusoff and Krishnan were woken up by the noise of the deceased shouting, "Matamata (police), Mohamed has stabbed me." They saw the deceased a few yards away on the road, pursuing 3 men who were running away from the scene. Yusoff and Krishnan joined the chase, Yusoff following a few yards behind the deceased, and Krishnan a few yards behind Yusoff. The latter recognised the three men as Mohamed, Hassan and Haja Mohideen, the three appellants, as they ran towards the corner of the road before disappearing from view. The deceased, who had been mortally injured, collapsed after running 100 yards and Yusoff and Krishnan broke off the chase to help him. When they asked him who had stabbed him, the deceased replied, "Mohamed stabbed me and Hassan and Haja Mohideen were with him." A telephone message was sent to the Radio Police Patrol and in a few minutes a Radio Police Van arrived and a Sergeant began to take down a statement from the deceased. In the statement the deceased said that he had been woken up by four Indians, whom he named as Mohamed, Hassan, Haja Mohideen and Kakak, and that Mohamed had stabbed him in the stomach with a knife. Shortly afterwards the ambulance arrived and the deceased was taken to the General Hospital where he fixed his thumb impression to his statement and died shortly afterwards.

On appeal it was argued by counsel for the appellants that (a) the certified copy of the statement made by the deceased to the Radio Police Sergeant was inadmissible under sections 114 and 116 of the Criminal Procedure Code, as it was not a first report to a police station, and that in any event it could only be admitted for the limited purpose of contradicting or corroborating the person making the statement, and (b) that if the statement was to be regarded as dying statement under section 32 of the Evidence Ordinance it was incomplete.

Held: (1) the statement if admitted as a police report under sections 114 and 116 of the Criminal Procedure Code could only be used for the purpose of contradicting or corroborating the testimony of the person who made it and since Abdul Rahim had died before the proceedings began, it was obvious that the question of contradicting or corroborating his evidence in the present case could not arise;

(2) if the statement was admitted as a dying declaration the jury should have been warned that the statement was not made on oath and subjected to cross-examination and as this was not done in this case it amounted to a serious misdirection.

Cases referred to:—

(1) *Teper v. R.*, (1952) A.C. 480.
(2) *R. v. Waugh*, (1950) A.C. 203.
(3) *R. v. Bedingfield*, 14 Cox C.C. 341.
(4) *R. v. Christie* (1914) A.C. 545.

COURT OF CRIMINAL APPEAL.

N. C. Goho for the appellants.

T. A. Mahony (Crown Counsel) for the respondent.

Cur. Adv. Vult.

The judgment of the Court was delivered by:

Whyatt C.J.: — In this case the appellants, Mohamed s/o Allapitchay, Hassan bin Mohamed and Haja Mohideen s/o Shaik Dawood, appeal

against their conviction for the murder of a man named Abdul Rahim on the ground that certain important evidence was wrongly admitted, and that other important evidence, though rightly admitted, was left to the jury without proper directions.

The facts of this case, so far as they are material to this appeal, may be briefly stated. The murdered man, Rahim, was a stall-holder at the Telok Ayer Market and it was his habit to sleep at night at his stall which was situated a few yards away from the road which runs alongside the market at this point. Several other neighbouring stall-holders and their assistants also used to sleep at their stalls, in particular, a man named Yusoff s/o Mohamed and a man named Sinathamby Krishnan, both of whom gave important evidence for the prosecution at the trial. On the night of the murder, the 22nd July 1957, Rahim went to sleep at his stall sometime before midnight; several other stall-holders among them Yusoff and Krishnan, did likewise. At 3.45 a.m. Yusoff and Krishnan were woken up by the noise of Rahim shouting, "Matamata (police), Mohamed has stabbed me." They saw Rahim a few yards away on the road which runs alongside the market. He was pursuing three men who were running away from the scene. Yusoff and Krishnan got up and joined in the chase, Yusoff following a few yards behind Rahim, and Krishnan a few yards behind Yusoff. The latter recognised the three men as Mohamed, Hassan and Haja Mohideen, the three appellants, as they ran towards the corner of the road before disappearing from view. Rahim, who had been mortally injured, collapsed after running 100 yards and Yusoff and Krishnan broke off the chase to help him. When they asked him who had stabbed him, Rahim replied, "Mohamed stabbed me and Hassan and Haja Mohideen were with him." A telephone message was sent to the Radio Police Patrol and in a few minutes a Radio Police Van arrived and a Sergeant began to take down a statement from Rahim. In the statement Rahim said that he had been woken up by four Indians, whom he named as Mohamed, Hassan, Haja Mohideen and Kakak, and that Mohamed had stabbed him in the stomach with a knife. Shortly afterwards the ambulance arrived and Rahim was taken to the General Hospital where he fixed his thumb impression to his statement and died shortly afterwards.

At the hearing of this appeal counsel for the appellants contended that the certified copy of the statement made by Rahim to the Radio Police sergeant was inadmissible under sections 114 and 116 of the Criminal Procedure Code, as it was not a first report to a police station and in any event, it could only be admitted for the limited purpose of contradicting or corroborating the person making the statement in accordance with the provisions of sections 146 and 158 of the Evidence Ordinance, and this was manifestly impossible in the present case. It was further objected that if the statement was to be regarded as a dying declaration under section 32 of the Evidence Ordinance, it was inadmissible as such because it was incomplete and did not contain the *ipsissima verba* of the dying man, but for reasons which appear later in this judgment, it is unnecessary to decide this point.

Counsel for the appellants admitted that no objection of any kind was taken to the admission of this statement in the Court below, nor, apparently, was any indication given to the learned trial Judge by Counsel for the Crown that it might be held to be inadmissible if the Court took a certain view of the relevant statutory provisions. The evidence was, therefore, admitted without any question being raised by either side and it is only now on appeal that this Court is asked to rule that it was inadmissible and that the verdict of the jury should be set aside. The Court considers it is most unfortunate that the trial in the Court below took this unsatisfactory course and has anxiously considered whether it should allow objection to be taken at this stage. However, as Lord Normand pointed out in *Teper v. The Queen*[1], failure to take objection to the admissibility of evidence at the trial does not necessarily preclude objection being taken on appeal, and in all the circumstances of this case, the Court is of the opinion that the appellants should be allowed to take objection in this Court.

It is clear from the provisions of sections 146 and 158 of the Evidence Ordinance that this statement, if admitted as a police report under sections 114 and 116 of the Criminal Procedure Code, could only be used for the purpose of contradicting or corroborating the testimony of the person who made it and since Rahim perished before even these proceedings began, it is obvious that the question of contradicting or corroborating his evidence in the present case could not arise. This ground is sufficient to exclude the admission of this statement under sections 114

and 116 of the Criminal Procedure Code and it is unnecessary to consider the further point that it was not a first report to a police station within the meaning of section 114 of the Code.

The appellants further contended that the oral statement made to Yusoff and Krishnan before the arrival of the police sergeant was not properly left to the jury. It was argued that if this statement was admitted under section 32 of the Evidence Ordinance as a statement made as to the cause of his death by a person who has since died, it was incumbent on the trial Judge, when directing the jury, to point out to them that it was a statement not made on oath and which had not been submitted to the test of cross-examination. It is undoubtedly necessary when dying declarations are admitted under the common law, that the Judge should so direct the jury. As Lord Oaksey said in *R. v. Waugh*,[2] "it was a further and even more serious error not to point out that (the dying declaration) had not been subject to cross-examination." The question arises whether the position is any different when a statement as to the cause of his death by a person who has since died is admitted in evidence pursuant to the statutory provisions of section 32 of the Evidence Ordinance. The learned editors of *Ratanlal and Thakore's* Law of Evidence, commenting on this point at page 297, state that

> "An information lodged by a person who died subsequently, relating to the cause of his death, is admissible as a substantive piece of evidence under the provisions of section 32. At the same time the jury should be reminded that the statement in question had not been made on oath, nor had it been tested by cross-examination but that after bearing these points in mind it would be for the jury to give it such weight as they considered necessary."

Apart, however, from this authority, the Court reaches the same conclusion on principle since it seems clear that unless the jury are so directed they may fall into the error of assuming that a statement admitted under section 32 is of the same quality as evidence which has been given on oath and subjected to cross-examination. In the present case the oral statement made by Rahim to Yusoff and Krishnan about the stabbing was left to the jury without any reference to the fact that it was not made on oath and not tested by cross-examination, and in the circumstances the jury might well have attached the same weight to it as if it had been sworn testimony which had been the subject of cross-examination. The Court is of the opinion that this omission amounted to a serious misdirection in this case.

Likewise Rahim's statement to the Radio Police Sergeant, if it be regarded as a dying declaration, and his shout "Mohamed has stabbed me" which woke up Yusoff and Krishnan, are open to the same criticism since it was not pointed out to the jury that they were unsworn and not tested by cross-examination. The Court has, however, considered whether it could be said that the evidence of Rahim's shout was admissible on another ground, namely, that it was part of the *res gestae*. But as Lord Norman stated in *R. v. Teper*[1], at page 484, "it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done.....". The evidence in the present case does not establish that Rahim's cry "Mohamed has stabbed me" was "part of the thing being done". On the contrary, the three persons who it is said committed this crime were running away from the scene of the crime as fast as they could when the cry was heard. The thing had been done. In the words of Cockburn C.J. in *Reg. v. Bedingfield*[3] cited with approval by Lord Reading in *R. v. Christie*[4], "It was not part of anything done, or something said while something was being done, but something said after something done." Accordingly the Court is of the opinion that this statement was not part of the *res gestae*.

A further ground of appeal, affecting only the second and third appellants, was relied upon at the hearing of this appeal. It was contended that even if the Court held that the evidence was sufficient to prove that Mohamed inflicted the fatal stab wound, it was not sufficient to establish that Hassan and Haja Mohideen shared a common intention with Mohamed to murder Rahim by stabbing. The Crown, on the other hand, argued that the statement of Rahim to Yusoff and Krishnan, (assuming it was properly left to the jury), to the effect that Mohamed stabbed him and that Hassan and Haja Mohideen were with him, coupled with the evidence that these three men were seen running away together from the scene of the crime was sufficient to justify the jury drawing the inference that all three were acting in concert when this stabbing attack was made on Rahim. The Court considers it is undesirable, in view of the fact that there

is to be a re-trial in this case, that the Court should comment on this aspect of the evidence beyond pointing out that no submission was made on behalf of Hassan and Haja Mohideen at the close of the prosecution's case that they were entitled to an acquittal as there was no evidence of common intention, and stating that if such a submission had been made, it would, in the opinion of the Court, have failed. However, for the reasons given earlier in this judgment, the Court is of the opinion that the trial was unsatisfactory and the conviction should be quashed, but in view of all the circumstances of this case, the Court considers it is a proper one in which to order a re-trial and orders a re-trial accordingly.

Re-trial ordered.

Solicitors: *Goho & Co.*

Re MOK PENG CHIA trading as CHOP CHIA MOH; *Ex parte* OFFICIAL ASSIGNEE

[C. A. (Whyatt C.J., Mathew C.J. (F.M.) and Knight J.) October 31, 1956]

[Singapore — Civil Appeal No. 16 of 1956]

Bankruptcy — Fraudulent preference — Bankruptcy Ordinance (Cap.11), s.52(1).

This was an appeal against the decision of the Judge sitting in Bankruptcy in which it was held that a payment of $4,000 by the debtor to the appellant, Chye Chiang Ltd., constituted a fraudulent preference. The evidence showed that at the date of the payment the debtor's firm, of which the debtor was the sole proprietor, was insolvent. The question was whether the dominant motive of the debtor was to prefer the particular creditor.

Held: (1) on the facts the only substantial motive actuating the debtor was that he wished to repay an old friend in full as soon as funds became available and that he wished to make this payment notwithstanding that he was unable at that time to meet his numerous trade debts as they fell due;

(2) consequently the dominant motive of the debtor was a desire to prefer the particular creditor and the payment therefore constituted a fraudulent preference

Cases referred to:—

(1) *Sime Darby & Co. Ltd. v. Official Assignee*, 1 M.C. 116, P.C.

(2) *Peat v. Gresham Trust* (1934) 2 A.C. 252; (1934) All E.R. Rep. 82.

(3) *Re M. Kusler* (1943) Ch. 248.

(4) *In re Fletcher, ex parte Suffolk*, 9 Morr. 8.

In the Court below the following judgment was delivered:—

Whitton J.: — These proceedings arise out of a motion for a declaration that the payment by the bankrupt of the sum of $4,000 to Chye Chiang Ltd. on or about the 11th June 1954 constituted a fraudulent preference to that firm, and for an order that the same be refunded to the Official Assignee.

The bankrupt was the sole proprietor of a business known as Chop Chia Moh carried on at No. 16 Circular Road, Singapore. On 6th July 1954 an Interim Receiver of the property of Mok Peng Chia was appointed, and on the 16th of the same month an Adjudication Order was made against him. From the bankrupt's affidavit of 20th June 1956 it is clear that from at least the end of March 1954 his firm was in financial difficulties.

Regarding the payment of $4,000 to Chye Chiang Ltd. which is now impugned as a fraudulent preference under section 52(1) of the Bankruptcy Ordinance there are in evidence two material affidavits, one by Koh Choon Siang, the Managing Director of Chye Chiang Ltd., the other by Louis Miserus, dated 6th July 1954, made in support of the application for the appointment of an Interim Receiver.

Mr. Koh, whose credibility has not been questioned, states that at the end of February 1954 he complied with a request by Mok Peng Chia, who was an old friend of his, for an interest-free loan of $10 000. and that it was agreed the loan should be repayable in three instalments, the final one of $4,000 to become due on May 28th. The first two instalments were settled on the fixed dates, but just before the final payment should have been made Mok asked Koh if he would postpone presentation of the cheque which had been drawn for the $4,000 until June 11th, as he, Mok had not at the moment money to meet it. Koh agreed to this, but told Mok that it was his company's money which was involved and that if the cheque was not met on June 11th the company would have no alternative but to commence legal proceedings to recover the amount due. The cheque was duly honoured, however, when presented on June 11th. About a week before this request for postponement of presentation Mok had approached Koh for a further loan of $5,000. Koh replied to the effect that he was unwilling to lend any